

1 **BEFORE THE POLLUTION CONTROL HEARINGS BOARD**
2 **STATE OF WASHINGTON**

3 **COMET TRAILER MANUFACTURING)**
4 **CORPORATION,)**

PCHB NO. 91-121

5 **Appellant,)**

6 **v.)**

**ORDER GRANTING
RECONSIDERATION AND
MODIFYING FINAL ORDER**

7 **STATE OF WASHINGTON,)**
8 **DEPARTMENT OF ECOLOGY,)**

9 **Respondent.)**
10 _____)

11 **I**

12 The Pollution Control Hearings Board ("Board") on August 13, 1992, read the parties
13 the following ruling:

14 Having heard witness' testimony, examined exhibits, listened to the tapes of the
15 proceedings, read post-hearing briefs, and deliberated, the Board has reached
this decision:

16 The Department of Ecology's Penalty Order No. DE 90-C281 is affirmed at
17 \$94,000 with \$44,000 suspended, provided that Comet Trailer Manufacturing
18 Corporation does not violate state hazardous waste laws for three years from
the issuance of the final order.

19 As the prevailing party, Kathy Gerla is requested to write a Proposed Findings
20 of Fact, Conclusions of Law and Order for the Board's review by September
21 10, 1992.

22 On December 24, 1992, the Department of Ecology ("Ecology") filed the
23 proposed Findings of Fact and Conclusions of Law with the Board.

24
25
26 **ORDER GRANTING RECONSIDERATION**
27 **AND MODIFYING FINAL ORDER**
PCHB No. 91-121 (1)

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27

II

Comet Trailer Manufacturing Corporation ("Comet Trailer") received this document from Ecology, on December 28, 1992.

III

The Board, on December 31, 1992, signed and entered the Findings of Fact, Conclusions of Law and Order, as proposed.

IV

Ecology filed a Motion for Reconsideration on January 6, 1993, averring that it had inadvertently failed to include the text of Conclusion of Law XXIV in the proposed order. Ecology pointed out that Conclusion of Law XXIV was supported by Finding of Fact XX.

V

Comet Trailer filed its response to Ecology's motion on January 14, 1993. Comet Trailer objected, arguing that it had not violated the generator record keeping requirement of WAC 173-303-210(2), which at the time of the alleged violation directed each generator to:

keep a copy of each annual report and exception report as required by WAC 173-303-220 for a period of at least three years..¹

VI

On January 21, 1993, Ecology submitted its Reply to Comet Trailer's response. This filing was late; accordingly, we do not consider this reply in reaching our result from the due date of each report.

VII

We disagree with Comet Trailer's argument. Finding of Fact XX states:

¹ The regulation has subsequently been amended to require that such reports be kept for five years. WAC 173-303-210(2), Order 90-42, filed 3/7/91.

1 During the September 25 inspection, Comet Trailer was unable to produce a
2 copy of its 1987 form 4 Generator Annual Dangerous Waste Report. At the
3 time of the inspection, Steve Owens indicated Comet Trailer did not have a
4 copy. The due date of the report was March 1, 1988.

5 At the hearing, Comet Trailer produced a copy of a 1987 Form 4, which Steve
6 Owens testified had been misplaced at the time of inspection. The section of the
7 form that required a signed certification under penalty of perjury was not signed
8 on the form submitted. Mr. Owens changed his story several times during
9 questioning at the hearing, and we do not find his testimony to be credible. We
10 also do not find the Form 4 submitted at the hearing to be a copy of the signed
11 Form 4 submitted to Ecology. We find that Comet Trailer failed to keep a copy
12 of the 1987 Form 4 Annual Dangerous Waste Report submitted to Ecology for
13 three years from the due date of the report (emphasis added).

14 VIII

15 Conclusion of Law XXIV, is blank, except for the title: "Recordkeeping". It is
16 obvious that the author intended something to be written in Conclusion of Law XXIV. The
17 language proposed by Ecology, for Conclusion of Law XXIV is as follows:

18 We conclude Comet Trailer did not keep a copy of its 1987 Form 4 Generator
19 Annual Dangerous Waste Report for three years from the date of that report, in
20 violation of WAC 173-303-210(2). (See Finding of Fact XX.) The incomplete
21 unsigned copy of the form submitted at the hearing does not meet the
22 requirements of the rule. WAC 173-303-210(2) requires generators to "keep a
23 copy of each arrival report." (Emphasis added.) WAC 173-303-270(1)
24 requires annual reports to be submitted according to the instructions on the form
25 which includes a signed certification. WAC 173-303-210(2) can reasonably be
26 interpreted to require a generator to keep a copy of the final, completed forms
27 required to be submitted to Ecology. Allowing generators to keep copies of
drafts or incomplete forms frustrates the purpose of the recordkeeping
requirement.

IX

This language is supported by Finding of Fact XX; WAC 173-303-220(1), which
requires that the form be submitted "according to the instructions thereon," which form

1 requires a signed certification under penalty of perjury, and WAC 173-303-210(2), which
2 requires that the generator keep a copy of the form, "as required by WAC 173-303-220.

3
4 X

5 Comet Trailer argues that it should be excused from the signature requirement,
6 because, it contends, no reason has been established for the importance of keeping a signed
7 copy. Comet Trailer's Response at 3. However, a careful reading of these regulations
8 discloses that they do impose such a requirement.

9 XI

10 Comet Trailer's argument, could be regarded as a challenge to Ecology's regulation.
11 The regulation is presumed valid and subject to the following test:

12 Where the Legislature has specifically delegated to an administrator the power
13 to make regulations, such regulations are presumed valid. The burden of
14 overcoming this presumption lies on the challenger. Judicial review is limited
15 to a determination of whether the regulation is reasonably consistent with the
16 statute being implemented.

17 Oregon Nat'l Ins. Co. v. Marquardt, 115 Wn.2d 416, 423, 799 P.2d 235 (1990). Accord,

18
19
20
21
22
23
24
25
26
27
28
29
30
31
32
33
34
35
36
37
38
39
40
41
42
43
44
45
46
47
48
49
50
51
52
53
54
55
56
57
58
59
60
61
62
63
64
65
66
67
68
69
70
71
72
73
74
75
76
77
78
79
80
81
82
83
84
85
86
87
88
89
90
91
92
93
94
95
96
97
98
99
100
101
102
103
104
105
106
107
108
109
110
111
112
113
114
115
116
117
118
119
120
121
122
123
124
125
126
127
128
129
130
131
132
133
134
135
136
137
138
139
140
141
142
143
144
145
146
147
148
149
150
151
152
153
154
155
156
157
158
159
160
161
162
163
164
165
166
167
168
169
170
171
172
173
174
175
176
177
178
179
180
181
182
183
184
185
186
187
188
189
190
191
192
193
194
195
196
197
198
199
200
201
202
203
204
205
206
207
208
209
210
211
212
213
214
215
216
217
218
219
220
221
222
223
224
225
226
227
228
229
230
231
232
233
234
235
236
237
238
239
240
241
242
243
244
245
246
247
248
249
250
251
252
253
254
255
256
257
258
259
260
261
262
263
264
265
266
267
268
269
270
271
272
273
274
275
276
277
278
279
280
281
282
283
284
285
286
287
288
289
290
291
292
293
294
295
296
297
298
299
300
301
302
303
304
305
306
307
308
309
310
311
312
313
314
315
316
317
318
319
320
321
322
323
324
325
326
327
328
329
330
331
332
333
334
335
336
337
338
339
340
341
342
343
344
345
346
347
348
349
350
351
352
353
354
355
356
357
358
359
360
361
362
363
364
365
366
367
368
369
370
371
372
373
374
375
376
377
378
379
380
381
382
383
384
385
386
387
388
389
390
391
392
393
394
395
396
397
398
399
400
401
402
403
404
405
406
407
408
409
410
411
412
413
414
415
416
417
418
419
420
421
422
423
424
425
426
427
428
429
430
431
432
433
434
435
436
437
438
439
440
441
442
443
444
445
446
447
448
449
450
451
452
453
454
455
456
457
458
459
460
461
462
463
464
465
466
467
468
469
470
471
472
473
474
475
476
477
478
479
480
481
482
483
484
485
486
487
488
489
490
491
492
493
494
495
496
497
498
499
500
501
502
503
504
505
506
507
508
509
510
511
512
513
514
515
516
517
518
519
520
521
522
523
524
525
526
527
528
529
530
531
532
533
534
535
536
537
538
539
540
541
542
543
544
545
546
547
548
549
550
551
552
553
554
555
556
557
558
559
560
561
562
563
564
565
566
567
568
569
570
571
572
573
574
575
576
577
578
579
580
581
582
583
584
585
586
587
588
589
590
591
592
593
594
595
596
597
598
599
600
601
602
603
604
605
606
607
608
609
610
611
612
613
614
615
616
617
618
619
620
621
622
623
624
625
626
627
628
629
630
631
632
633
634
635
636
637
638
639
640
641
642
643
644
645
646
647
648
649
650
651
652
653
654
655
656
657
658
659
660
661
662
663
664
665
666
667
668
669
670
671
672
673
674
675
676
677
678
679
680
681
682
683
684
685
686
687
688
689
690
691
692
693
694
695
696
697
698
699
700
701
702
703
704
705
706
707
708
709
710
711
712
713
714
715
716
717
718
719
720
721
722
723
724
725
726
727
728
729
730
731
732
733
734
735
736
737
738
739
740
741
742
743
744
745
746
747
748
749
750
751
752
753
754
755
756
757
758
759
760
761
762
763
764
765
766
767
768
769
770
771
772
773
774
775
776
777
778
779
780
781
782
783
784
785
786
787
788
789
790
791
792
793
794
795
796
797
798
799
800
801
802
803
804
805
806
807
808
809
810
811
812
813
814
815
816
817
818
819
820
821
822
823
824
825
826
827
828
829
830
831
832
833
834
835
836
837
838
839
840
841
842
843
844
845
846
847
848
849
850
851
852
853
854
855
856
857
858
859
860
861
862
863
864
865
866
867
868
869
870
871
872
873
874
875
876
877
878
879
880
881
882
883
884
885
886
887
888
889
890
891
892
893
894
895
896
897
898
899
900
901
902
903
904
905
906
907
908
909
910
911
912
913
914
915
916
917
918
919
920
921
922
923
924
925
926
927
928
929
930
931
932
933
934
935
936
937
938
939
940
941
942
943
944
945
946
947
948
949
950
951
952
953
954
955
956
957
958
959
960
961
962
963
964
965
966
967
968
969
970
971
972
973
974
975
976
977
978
979
980
981
982
983
984
985
986
987
988
989
990
991
992
993
994
995
996
997
998
999
1000
1001
1002
1003
1004
1005
1006
1007
1008
1009
1010
1011
1012
1013
1014
1015
1016
1017
1018
1019
1020
1021
1022
1023
1024
1025
1026
1027
1028
1029
1030
1031
1032
1033
1034
1035
1036
1037
1038
1039
1040
1041
1042
1043
1044
1045
1046
1047
1048
1049
1050
1051
1052
1053
1054
1055
1056
1057
1058
1059
1060
1061
1062
1063
1064
1065
1066
1067
1068
1069
1070
1071
1072
1073
1074
1075
1076
1077
1078
1079
1080
1081
1082
1083
1084
1085
1086
1087
1088
1089
1090
1091
1092
1093
1094
1095
1096
1097
1098
1099
1100
1101
1102
1103
1104
1105
1106
1107
1108
1109
1110
1111
1112
1113
1114
1115
1116
1117
1118
1119
1120
1121
1122
1123
1124
1125
1126
1127
1128
1129
1130
1131
1132
1133
1134
1135
1136
1137
1138
1139
1140
1141
1142
1143
1144
1145
1146
1147
1148
1149
1150
1151
1152
1153
1154
1155
1156
1157
1158
1159
1160
1161
1162
1163
1164
1165
1166
1167
1168
1169
1170
1171
1172
1173
1174
1175
1176
1177
1178
1179
1180
1181
1182
1183
1184
1185
1186
1187
1188
1189
1190
1191
1192
1193
1194
1195
1196
1197
1198
1199
1200
1201
1202
1203
1204
1205
1206
1207
1208
1209
1210
1211
1212
1213
1214
1215
1216
1217
1218
1219
1220
1221
1222
1223
1224
1225
1226
1227
1228
1229
1230
1231
1232
1233
1234
1235
1236
1237
1238
1239
1240
1241
1242
1243
1244
1245
1246
1247
1248
1249
1250
1251
1252
1253
1254
1255
1256
1257
1258
1259
1260
1261
1262
1263
1264
1265
1266
1267
1268
1269
1270
1271
1272
1273
1274
1275
1276
1277
1278
1279
1280
1281
1282
1283
1284
1285
1286
1287
1288
1289
1290
1291
1292
1293
1294
1295
1296
1297
1298
1299
1300
1301
1302
1303
1304
1305
1306
1307
1308
1309
1310
1311
1312
1313
1314
1315
1316
1317
1318
1319
1320
1321
1322
1323
1324
1325
1326
1327
1328
1329
1330
1331
1332
1333
1334
1335
1336
1337
1338
1339
1340
1341
1342
1343
1344
1345
1346
1347
1348
1349
1350
1351
1352
1353
1354
1355
1356
1357
1358
1359
1360
1361
1362
1363
1364
1365
1366
1367
1368
1369
1370
1371
1372
1373
1374
1375
1376
1377
1378
1379
1380
1381
1382
1383
1384
1385
1386
1387
1388
1389
1390
1391
1392
1393
1394
1395
1396
1397
1398
1399
1400
1401
1402
1403
1404
1405
1406
1407
1408
1409
1410
1411
1412
1413
1414
1415
1416
1417
1418
1419
1420
1421
1422
1423
1424
1425
1426
1427
1428
1429
1430
1431
1432
1433
1434
1435
1436
1437
1438
1439
1440
1441
1442
1443
1444
1445
1446
1447
1448
1449
1450
1451
1452
1453
1454
1455
1456
1457
1458
1459
1460
1461
1462
1463
1464
1465
1466
1467
1468
1469
1470
1471
1472
1473
1474
1475
1476
1477
1478
1479
1480
1481
1482
1483
1484
1485
1486
1487
1488
1489
1490
1491
1492
1493
1494
1495
1496
1497
1498
1499
1500
1501
1502
1503
1504
1505
1506
1507
1508
1509
1510
1511
1512
1513
1514
1515
1516
1517
1518
1519
1520
1521
1522
1523
1524
1525
1526
1527
1528
1529
1530
1531
1532
1533
1534
1535
1536
1537
1538
1539
1540
1541
1542
1543
1544
1545
1546
1547
1548
1549
1550
1551
1552
1553
1554
1555
1556
1557
1558
1559
1560
1561
1562
1563
1564
1565
1566
1567
1568
1569
1570
1571
1572
1573
1574
1575
1576
1577
1578
1579
1580
1581
1582
1583
1584
1585
1586
1587
1588
1589
1590
1591
1592
1593
1594
1595
1596
1597
1598
1599
1600
1601
1602
1603
1604
1605
1606
1607
1608
1609
1610
1611
1612
1613
1614
1615
1616
1617
1618
1619
1620
1621
1622
1623
1624
1625
1626
1627
1628
1629
1630
1631
1632
1633
1634
1635
1636
1637
1638
1639
1640
1641
1642
1643
1644
1645
1646
1647
1648
1649
1650
1651
1652
1653
1654
1655
1656
1657
1658
1659
1660
1661
1662
1663
1664
1665
1666
1667
1668
1669
1670
1671
1672
1673
1674
1675
1676
1677
1678
1679
1680
1681
1682
1683
1684
1685
1686
1687
1688
1689
1690
1691
1692
1693
1694
1695
1696
1697
1698
1699
1700
1701
1702
1703
1704
1705
1706
1707
1708
1709
1710
1711
1712
1713
1714
1715
1716
1717
1718
1719
1720
1721
1722
1723
1724
1725
1726
1727
1728
1729
1730
1731
1732
1733
1734
1735
1736
1737
1738
1739
1740
1741
1742
1743
1744
1745
1746
1747
1748
1749
1750
1751
1752
1753
1754
1755
1756
1757
1758
1759
1760
1761
1762
1763
1764
1765
1766
1767
1768
1769
1770
1771
1772
1773
1774
1775
1776
1777
1778
1779
1780
1781
1782
1783
1784
1785
1786
1787
1788
1789
1790
1791
1792
1793
1794
1795
1796
1797
1798
1799
1800
1801
1802
1803
1804
1805
1806
1807
1808
1809
1810
1811
1812
1813
1814
1815
1816
1817
1818
1819
1820
1821
1822
1823
1824
1825
1826
1827
1828
1829
1830
1831
1832
1833
1834
1835
1836
1837
1838
1839
1840
1841
1842
1843
1844
1845
1846
1847
1848
1849
1850
1851
1852
1853
1854
1855
1856
1857
1858
1859
1860
1861
1862
1863
1864
1865
1866
1867
1868
1869
1870
1871
1872
1873
1874
1875
1876
1877
1878
1879
1880
1881
1882
1883
1884
1885
1886
1887
1888
1889
1890
1891
1892
1893
1894
1895
1896
1897
1898
1899
1900
1901
1902
1903
1904
1905
1906
1907
1908
1909
1910
1911
1912
1913
1914
1915
1916
1917
1918
1919
1920
1921
1922
1923
1924
1925
1926
1927
1928
1929
1930
1931
1932
1933
1934
1935
1936
1937
1938
1939
1940
1941
1942
1943
1944
1945
1946
1947
1948
1949
1950
1951
1952
1953
1954
1955
1956
1957
1958
1959
1960
1961
1962
1963
1964
1965
1966
1967
1968
1969
1970
1971
1972
1973
1974
1975
1976
1977
1978
1979
1980
1981
1982
1983
1984
1985
1986
1987
1988
1989
1990
1991
1992
1993
1994
1995
1996
1997
1998
1999
2000
2001
2002
2003
2004
2005
2006
2007
2008
2009
2010
2011
2012
2013
2014
2015
2016
2017
2018
2019
2020
2021
2022
2023
2024
2025
2026
2027
2028
2029
2030
2031
2032
2033
2034
2035
2036
2037
2038
2039
2040
2041
2042
2043
2044
2045
2046
2047
2048
2049
2050
2051
2052
2053
2054
2055
2056
2057
2058
2059
2060
2061
2062
2063
2064
2065
2066
2067
2068
2069
2070
2071
2072
2073
2074
2075
2076
2077
2078
2079
2080
2081
2082
2083
2084
2085
2086
2087
2088
2089
2090
2091
2092
2093
2094
2095
2096
2097
2098
2099
2100
2101
2102
2103
2104
2105
2106
2107
2108
2109
2110
2111
2112
2113
2114
2115
2116
2117
2118
2119
2120
2121
2122
2123
2124
2125
2126
2127
2128
2129
2130
2131
2132
2133
2134
2135
2136
2137
2138
2139
2140
2141
2142
2143
2144
2145
2146
2147
2148
2149
2150
2151
2152
2153
2154
2155
2156
2157
2158
2159
2160
2161
2162
2163
2164

1 Establish standards for the safe transport, treatment, storage, and disposal of
2 dangerous wastes as may be necessary to protect human health and the
3 environment.

4 XIII

5 Ecology also has the authority under RCW 70.95.060, to adopt minimal functional
6 standards for solid-waste handling. Finally, Ecology has general authority to adopt regulations
7 necessary and appropriate to carry out its duties, which are prescribed by law.
8 RCW 43.21B.064(9), .080.

9 XIV

10 The regulation is consistent with state and federal law governing dangerous wastes.
11 These regulations fulfill the purposed of the legislature, which decreed that:

12 Strong and effective enforcement of federal and state hazardous waste laws and
13 regulations is essential to protect the public health and the environment.

14 RCW 70.105.005(4). Ecology requires a signed certification from the generator as part of the
15 report. A copy that lacks the signature could hardly be regarded as evidence that the generator
16 was bound by the report. Lack of signature, therefore, could lead persons not personally
17 familiar with the preparation of the report, such as employees, successors, or those dealing
18 with the generator, to disregard statements contained in the report. This would run counter to
19 the emphasis on complete and expeditious disclosure regarding dangerous wastes.

20 XV

21 Based on the foregoing analysis, the Board grants Ecology's motion for reconsideration
22 and ORDERS that the Findings of Fact, Conclusions of law and Order be modified to amend
23 Conclusion of Law XXIV to read as follows:


24 We conclude Comet Trailer did not keep a copy of its 1987 Form 4
25 Generator Annual Dangerous Waste Report for three years from the date of that
26 report, in violation of WAC 173-303-210(2). (See Finding of Fact XX.) The

1 incomplete, unsigned copy of the form submitted at the hearing does not meet
2 the requirements of the rule. WAC 173-303-210(2) requires generators to
3 "keep a copy of each annual report . . . as required by WAC 173-303-220 for a
4 period of at least three years from the due date of each report." (Emphasis
5 added.) WAC 173-303-220(1) requires annual reports to be submitted
6 according to the instructions on the form, which includes a signed certification.
7 WAC 173-303-210(2) can reasonably be interpreted to require a generator to
8 keep a copy of the final, completed form required to be submitted to Ecology.
9 Allowing generators to keep copies of drafts or incomplete forms frustrates the
10 purpose of the recordkeeping requirement.

11 DONE this 28th day of January, 1993

12 POLLUTION CONTROL HEARINGS BOARD

13 
14 HAROLD S. ZIMMERMAN, Presiding

15 
16 ROBERT V. JENSEN, Attorney Member

17 
18 ANNETTE S. MCGEE, Member

19 P91-121R

DEC 24 1992

POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

COMET TRAILER MANUFACTURING CORPORATION,)	PCHB No. 91-121
)	
Appellant,)	FINAL FINDINGS OF
)	FACT, CONCLUSIONS OF
v.)	LAW AND ORDER
)	
STATE OF WASHINGTON,)	
DEPARTMENT OF ECOLOGY,)	
)	
Respondent.)	

Comet Trailer Manufacturing Corporation appealed the Department of Ecology's (Ecology) Order No. DE 90-C280 and Notice of Penalty Incurred and Due No. DE 90-C281, which allege violations of the dangerous waste regulations, chapter 173-303 WAC. The appeals were consolidated. A Stipulation and Agreed Order of Partial Dismissal was entered disposing of the appeal of Order No. DE 90-C280. The Board held a hearing on the appeal of the penalty only.

A formal hearing was held on May 13 and 14, 1992, in Lacey, Washington. Present for the Pollution Control Hearings Board were Harold S. Zimmerman, presiding, Judith Bendor, and Annette McGee. Douglas S. Little of Perkins Cole represented

1 Comet Trailer. Assistant Attorney General Kathryn L. Gerla
2 represented Ecology. The proceedings were reported by Gene
3 Barker and Associates.

4 Witnesses were sworn and testified, exhibits were
5 admitted and examined, and post-hearing briefs were submitted.
6 Having reviewed the foregoing, the Board issues the following
7 decision.

8 EVIDENTIARY RULINGS

9 The Department of Ecology filed a Motion in Limine to
10 preclude the submission of certain evidence by Comet Trailer.
11 The Board orally ruled on Ecology's motion prior to the
12 hearing. This decision memorializes the Board's oral ruling.

13 1. Economic Hardship. Comet Trailer sought to admit
14 testimony and exhibits about the past and present financial
15 position of the company in an effort to persuade this Board to
16 reduce the amount of the penalty. We conclude that such
17 evidence is not relevant, and therefore not admissible. We
18 granted Ecology's motion on this issue and did not consider
19 the evidence.

20 We have consistently held that economic difficulties
21 cannot excuse a party from complying with environmental laws
22 that all other businesses are expected to follow. See Kenmore
23 Muffler v. Department of Ecology, PCHB No. 85-217 (1986);
24 American Plating Co. v. Department of Ecology, PCHB No. 84-340
25

1 (1986); Elliot Lake Water Co. v. Department of Ecology, PCHB
2 No. 88-20 (1989); Malarkey Asphalt Co. v Department of
3 Ecology, PCHB No. 85-261 (1986).

4 Kenmore Muffler and American Plating involved appeals of
5 penalties. In both cases, this Board refused to consider
6 evidence of the company's financial status as a basis for
7 reducing the amount of the penalties, and we affirmed the
8 penalties in full. In dicta, we urged Ecology to consider the
9 financial situation of the companies in determining whether or
10 how to collect the penalties. Although the evidence was
11 admitted in those cases, there is no indication that Ecology
12 moved to exclude that evidence prior to the hearing.

13 We adhere to our prior decisions. The financial position
14 of a company is not relevant to our review of the penalty
15 imposed by Ecology. It may be a factor for Ecology to
16 consider in determining an appropriate payment schedule for
17 collecting the penalty, but that is outside the scope of our
18 review.

19 2. Cost of Compliance. Comet Trailer sought to
20 introduce testimony on the expenses it incurred in complying
21 with the order issued by Ecology. We denied Ecology's motion
22 to exclude that evidence. One of the factors we look at in
23 determining if a penalty is excessive is the violator's post-

1 violation conduct. The expenditure of money to comply with
2 the order is part of that conduct.

3 FINDINGS OF FACT

4 I

5 Comet Trailer Manufacturing Corporation is in the
6 business of manufacturing truck trailers for the highway
7 transport of commercial goods and wastes. Its manufacturing
8 facility is located in Selah, Washington. The company has
9 operated at that location since November 1984, when it was
10 moved there from Spokane, Washington.

11 II

12 The Department of Ecology is a state agency with the
13 statutory responsibility for enforcing the State's dangerous
14 waste laws.

15 III

16 In 1985, Ecology issued to Comet Trailer a compliance
17 order and a \$10,000 penalty for violation of the dangerous
18 waste rules. The incident leading to the enforcement action
19 was Comet Trailer's illegal dumping of dangerous waste at the
20 Terrace Heights Landfill in Yakima, Washington. That landfill
21 is not an approved TSD (transfer, treatment, storage,
22 disposal) facility. Comet Trailer improperly disposed of
23 lead-contaminated paint waste and sawdust soaked with the
24 solvent xylene. Prior to Ecology's discovery of the illegal
25

1 disposal, Comet Trailer had not obtained a dangerous waste
2 identification number nor designated any of its dangerous
3 wastes.

4 On appeal, this Board affirmed Ecology's order and
5 penalty, finding Comet Trailer to be in violation of WAC 173-
6 303-060, failure to notify Ecology of dangerous waste
7 generation; WAC 173-303-070, failure to designate dangerous
8 wastes; WAC 173-303-141, disposal of dangerous waste at a
9 facility other than a permitted TSD facility; and WAC 173-303-
10 180, failure to use the dangerous waste manifest system. This
11 Board reduced the amount of the penalty to \$4,000, believing
12 Ecology's efforts had set Comet Trailer on the proper path.
13 See Comet Trailer Corp. v. Department of Ecology, PCHB 85-151
14 & 85-189. We take official notice of all facts found by this
15 Board in the 1985 proceeding.

16 IV

17 Ecology inspected the Comet Trailer facility again in
18 1990 and 1991. Beginning in September 1990, Ecology conducted
19 five inspections of the facility over a seven-month period.
20 These inspections led to Ecology's issuance of the penalty and
21 order in the present case (hereinafter "1991 penalty and
22 order").

V

On September 12, 1990, Ecology dangerous waste inspector Jerry French conducted an unannounced inspection of the Comet Trailer facility. The owner of the company, Bud Owens, the plant superintendent, and several other Comet Trailer employees accompanied Ecology's dangerous waste inspector.

VI

Since at least May 1986, Comet Trailer has operated a recycling still to reclaim spent solvents. The still is located inside the manufacturing plant. The company's painting operation produces a mixture of spent xylene and paint. The xylene is reclaimed and used again in Comet Trailer's painting activities. The company stores the paint/xylene mixture waiting to be recycled and the sludge remaining after recycling (still bottoms) in 55-gallon drums.

At the time of the inspection there were 13 55-gallon drums of paint/xylene mixture that had not been recycled and 10 55-gallon drums of still bottoms stored in the area near the still. None of the drums were marked with accumulation dates. The drums containing still bottoms were marked with masking tape on which had been written in felt pen "STILL SOLID WASTE". The remaining drums were not labeled in any fashion. None of the drums had labels identifying the major risks associated with the drums' contents, and none were marked with

1 the words "dangerous waste" or "hazardous waste". Some of the
2 drums were open. Some were missing bungs. Some of the drums
3 had no ring top fasteners and their lids were lying loose on
4 top of the drums.

5 There was inadequate aisle space between the drums for
6 the unobstructed movement of personnel and emergency response
7 equipment in the event of a fire, spill, or other emergency.
8 The drums were stored in a location that blocked access to the
9 recycling still by such personnel and equipment.

10 The plant supervisor stated that the drums had been there
11 for over two years, and that Comet Trailer had not transported
12 off site any of the dangerous wastes the company had generated
13 for the past two years.

14 VII

15 Spent xylene and the still bottoms from the recovery of
16 xylene are listed dangerous wastes (F003) in chapter 173-303
17 WAC.¹ In October 1990, Comet Trailer hired a hazardous waste
18 consulting company, Chem-Safe Services, Incorporated, to
19 designate and arrange for proper disposal of its dangerous
20 wastes. Chem-Safe designated the still bottoms as extremely
21 hazardous waste. Prior to Chem-Safe's analysis, Comet Trailer
22 had not followed the procedures in the dangerous waste rules

23
24 ¹The dangerous waste rules as amended January 1989 were
25 in effect at the time of the inspections and are being applied
in this proceeding.

1 to determine if the spent xylene or the still bottoms
2 designated as dangerous wastes.

3 VIII

4 In August 1985 Comet Trailer submitted to Ecology its
5 first Form 2 Notification of Dangerous Waste Activities. The
6 form stated:

7 Xylene waste is small and we are studying to see if
8 it will warrant a small in house recycling unit.
[Exh. R-8]

9 The form did not indicate Comet Trailer was conducting
10 recycling activities.

11 Ecology requires that Form 2 Notifications be submitted
12 to the Ecology program headquarters in Lacey, Washington,
13 where the information is kept in one data bank. The 1985 form
14 was the only Form 2 Notification submitted to Ecology prior to
15 issuance of the order and penalty in this case. Comet Trailer
16 did not submit to Ecology a revised Form 2 Notification when
17 it began recycling.

18 IX

19 During the September 12 inspection, Ecology's inspector
20 observed additional waste streams produced by Comet Trailer.
21 Comet Trailer uses a polyurethane foam to insulate its
22 refrigerated trailers. The polyurethane foam is made by
23 mixing two compounds, diphenylmethane diisocyanate ("Part A
24 Foam") and trichlorofluoromethane ("Part B Foam"). Each
25

1 compound is an extremely hazardous waste. Part A Foam and
2 Part B Foam are stored separately in 2500 gallon tanks. There
3 were foam chemical residues on the floor near the tanks and
4 leaks around the valves and flanges of the tanks. Prior to
5 the inspection, Comet Trailer had been dumping some of their
6 foam wastes at the Terrace Heights Landfill. Other waste
7 streams observed were: used rags which could be soaked with
8 xylene or other solvents, paint-related material, Part A Foam,
9 or Part B Foam; waste streams from painting activities, such
10 as filters, sludges, residues and floor sweepings; and used
11 oils. Prior to issuance of the 1991 penalty and order, Comet
12 Trailer had not determined if these waste streams were
13 designated as dangerous waste.

14 X

15 Comet Trailer had indicated on the Form 2 Notification
16 submitted in 1985 that it produced only three types of
17 dangerous wastes, in the following annual amounts: (1) dry
18 oversprayed paint--1200 pounds; (2) xylene--150 pounds; and
19 (3) methylene chloride--150 pounds. The estimated maximum
20 quantity of dangerous wastes generated per month was 125
21 pounds. Based on that information, Ecology determined that
22 Comet Trailer produced dangerous wastes below the quantity
23 exclusion limit (QEL) and was a small quantity generator.

At some point between the time Comet Trailer submitted its 1985 Form 2 Notification and when Ecology began inspecting the facility in 1990, Comet Trailer had started generating additional types of dangerous wastes and amounts above the QEL, and was no longer a small quantity generator.

After Ecology issued an order requiring the company to designate its wastes, Comet Trailer eventually designated all of the waste streams observed during the September 12 inspection. All of the waste streams except used oil designated as dangerous or extremely hazardous wastes. The Form 2 Notification submitted in November 1991, in response to Ecology's order, identified the following dangerous or extremely hazardous wastes produced by Comet Trailer:

<u>Waste</u>	<u>Waste Number</u>	<u>Annual Quantity</u>
Xylene, paint related material, sludge	WT01, D001, F003	3,000 lbs.
Solvex, flammable liquid solvent	D001, WP01, F002, F003	800 lbs.
Non-RCRA waste, dry paint filters, sweepings	WT02	7,200 lbs.
Part A foam, Polymerized M.D.I. Isocyanic Acid Polymethylenepolyphenylene	WT01	120 lbs.
Part B foam, Polyol blend resin component Trichlorofluoromethane	WT01, F002	120 lbs.
Rags with xylene, paint-related material sludge	D001, F003, WT01	120 lbs.

1 Rags with solvex, solvent, D001, WP01, 120 lbs.
2 Foam A and/or B F002, F003
3 [Exhibit R-7]

4 Comet Trailer estimated the maximum quantity it generated per
5 month as 997 pounds. The QEL for these wastes is 220 pounds
6 per month.

7 XI

8 At the time of the September 12 inspection, a number of
9 55-gallon drums and 5-gallon pails were stored in the parking
10 lot outside the building, in the northeast corner of the
11 property. Mr. French observed that the drums were not marked
12 with accumulation dates or the words "dangerous waste" or
13 "hazardous waste". They did not contain labels identifying
14 the major risks associated with the drums' contents, and some
15 drums were open. Ecology did not conduct a full inspection of
16 the area at that time because the Comet Trailer personnel
17 accompanying Mr. French did not know what was stored in that
18 area. Mr. French was told he needed to talk with the company
19 president and hazardous waste manager, Steve Owens, who was
20 then unavailable.

21 XII

22 During the course of the inspection, the inspector
23 pointed out to those accompanying him the dangerous waste rule
24 violations as he observed them. The Comet Trailer personnel
25 did not appear to be familiar with the regulation

1 requirements. The inspector also conducted an exit interview
2 with Bud Owens discussing the problems seen and suggesting
3 Mr. Owens hire a dangerous waste consultant.

4 XIII

5 Mr. French again inspected the Comet Trailer facility on
6 September 25, 1990, accompanied by Steve Owens. In the area
7 of the recycling still Mr. French observed the same drums he
8 had seen on his previous inspection. The problems earlier
9 noted had not been corrected. The drums were in the same
10 location, they did not have dangerous waste labels, and some
11 were open. An incorrect accumulation date had been written on
12 the drums in ink pen. The accumulation date written was a
13 date sometime after September 12, 1990. Steve Owens indicated
14 that the drums had been at that location for over two years.
15 We find it more likely than not that this dangerous waste had
16 been on site for at least two years.

17 Mr. French discussed with Steve Owens the additional
18 undesignated waste streams he had earlier observed inside the
19 building (see Finding of Fact IX) and the need to designate
20 those.

21 XIV

22 One hundred sixty-nine drums and 23 5-gallon pails,
23 either partially or completely full, were stored in the
24 parking lot in the northeast corner of the property. At the
25

1 time of the inspection, Steve Owens identified the contents as
2 xylene/paint mixture and still bottoms, paint and other floor
3 sweepings, used oil, paint, and trichlorofluoromethane.
4 Twelve additional drums contained undercoating tar (Tectyl
5 121-B) residues. Mr. Owens did not know if any of the
6 materials were dangerous wastes.

7 None of the containers were marked with a label
8 indicating the major risks associated with the contents of the
9 containers. None of the containers were marked with the words
10 "hazardous waste" or "dangerous waste", and none were marked
11 with an accumulation date. Some of the containers were open:
12 some had no lids, some were missing bungs, and some did not
13 have ring top fasteners.

14 Some of the 5-gallon pails of paint were severely
15 corroded and appeared to the inspector to have been there for
16 quite some time. Comet Trailer brought some of the paint from
17 Spokane in 1984. Its shelf life had expired and it was hard
18 and unusable. Some of the pails of paint were open to dust,
19 rain, and other elements. During the inspection, Ecology took
20 a sample from a 5-gallon pail of paint that had no lid. It
21 tested at 24.4 parts per million for lead, and designated as
22 dangerous waste. In 1984, Comet Trailer was using lead-based
23 paint. After Ecology issued the penalty and compliance order
24 in 1985, the company began using primarily non-leaded paint.

1 However, approximately 10 percent of the paint Comet Trailer
2 continues to use is lead-based.

3 XV

4 The parking lot on which the containers were stored is
5 bordered on the north by the Selah sewage treatment plant and
6 on the east by the outflow channel from the Selah plant. The
7 outflow channel flows into the Yakima River approximately a
8 mile to the south. The area of the parking lot where the
9 containers were stored slopes down to a storm drain catch
10 basin about 75 to 85 feet away. The contents of the catch
11 basin empty into the outflow channel. The storage area had no
12 containment system to catch spills or leaks. The containers
13 were stacked near the property boundary of the sewage
14 treatment plant. There was a danger that the containers could
15 spill onto the sewage treatment plant property or into the
16 catch basin and eventually into the Yakima River, posing a
17 threat to human health and the environment. Analysis of
18 sludge samples from the catch basin taken by Ecology in May
19 1991 detected, among other things, trichlorofluoromethane and
20 xylene, which were stored in the parking lot. The Comet
21 Trailer facility is also in a 100-year flood zone, as
22 determined by the Federal Emergency Management Agency.

23 The parking lot where the containers were stored was
24 frequented by truck traffic. There were no signs indicating
25

1 the area was a dangerous waste storage area. There were no
2 barriers to prevent vehicles from colliding with the dangerous
3 waste containers. There was no communication or alarm system
4 immediately accessible to personnel at the storage area, nor
5 was there any available fire control, spill control or
6 decontamination equipment.

7 XVI

8 Sometime after the September 25 inspection Chem-Safe
9 analyzed the materials stored in the parking lot. Prior to
10 Chem-Safe's analysis Comet Trailer had not designated these
11 materials. With the exception of 39 drums of used oil
12 Chem-Safe designated all the materials as dangerous or
13 extremely hazardous wastes.

14 The materials in the parking lot were eventually
15 transported under dangerous waste manifests to permitted TSD
16 facilities. On October 17, 1990, 9,595 pounds of xylene paint
17 sludge, 816 pounds of Tectyl 121-B undercoating tar, and 228
18 pounds of Tectyl 342 white paint were shipped to Sol-Pro, Inc.
19 On November 11, 1990, 1,500 pounds of Autofroth Component A
20 and sawdust were shipped to Chem-Pro, Inc. On November 20,
21 1990, 1,111 pounds of xylene paint sludge were sent to
22 Sol-Pro, and 1,050 pounds of Vultrafoam Part A were sent to
23 Chem-Pro. On December 14, 1990, 8,000 pounds of paint/floor
24 sweepings were shipped to EnviroSafe Services.

1 Comet Trailer challenges the designation of the paint/
2 floor sweepings. Comet Trailer's consultant from Chem-Safe
3 designated these sweepings, and later testified that based on
4 the information he had it was most likely the sweepings
5 designate as dangerous waste. Comet Trailer has provided no
6 evidence that the paint sweepings do not designate. We find
7 that the paint sweepings designate as dangerous waste.

8 XVII

9 We find that at the time of the inspection, the materials
10 stored in the parking lot had been accumulating on site for
11 two years, and had been on site for more than 90 days. At the
12 hearing Comet Trailer conceded that some of its still bottoms
13 and dry paint waste had been on site for more than 90 days,
14 since May 1990.

15 XVIII

16 Comet Trailer has never received a permit from Ecology to
17 operate a dangerous waste storage facility.

18 The 1985 Form 2 Notification submitted by Comet Trailer
19 did not indicate that the company was operating as a dangerous
20 waste storage facility. Comet Trailer did not submit to
21 Ecology a revised Form 2 Notification when it began operating
22 as a storage facility.

XIX

The first time Comet Trailer ever shipped its dangerous waste to a TSD facility was in October 1990. Prior to that time, since 1984, the company had continued to dispose of some of its xylene still bottoms and dry paint sweepings at the Terrace Heights Landfill. Comet Trailer had assumed these wastes were not dangerous wastes, but had not designated them in accordance with the procedures in WAC 173-303-070. Comet Trailer assumed the paint sweepings would not designate because the company had switched to mostly lead-free paint. Comet Trailer assumed the still bottoms were not dangerous waste because the company that sold Comet Trailer the recycling still said the still bottoms could be disposed of at the local landfill.

XX

During the September 25 inspection, Comet Trailer was unable to produce a copy of its 1987 Form 4 Generator Annual Dangerous Waste Report. At the time of the inspection, Steve Owens indicated Comet Trailer did not have a copy. The due date of the report was March 1, 1988.

At the hearing, Comet Trailer produced a copy of a 1987 Form 4, which Steve Owens testified had been misplaced at the time of the inspection. The section of the form that required a signed certification under penalty of perjury was not signed

1 on the form submitted. Mr. Owens changed his story several
2 times during questioning at the hearing, and we do not find
3 his testimony to be credible. We also do not find the Form 4
4 submitted at the hearing to be a copy of the signed Form 4
5 submitted to Ecology. We find that Comet Trailer failed to
6 keep a copy of the 1987 Form 4 Annual Dangerous Waste Report
7 submitted to Ecology for three years from the due date of the
8 report.

9 XXI

10 During the inspection, the Ecology inspector pointed out
11 the violations of dangerous waste rules as they were
12 discovered. He also conducted an exit interview and provided
13 Steve Owens with a copy of the dangerous waste regulations.

14 XXII

15 On October 1, 1990, Ecology wrote a letter to Comet
16 Trailer indicating that the drums of waste observed during the
17 September 12 and 25 inspections were subject to all applicable
18 requirements of the dangerous waste regulations. The letter
19 also indicated Ecology would be sending a second letter
20 informing Comet Trailer of the results of the previous
21 inspections. Ecology did not send the second letter.

22 XXIII

23 Ecology inspector French again visited the Comet Trailer
24 facility on October 16, 1990, to inspect the removal of the
25

1 drums of dangerous waste. Chem-Safe was preparing for
2 transport 35 of the dangerous waste containers located in the
3 parking lot outside.

4 A number of containers of dangerous waste still remained
5 in the northeast corner of the parking lot that Chem-Safe was
6 not transporting. The problems observed by Ecology during the
7 prior inspection had not been corrected. The containers were
8 stored in the same place and manner as on the previous
9 inspection. (See Finding of Fact XV.) This material had not
10 been designated. The inspector observed 21 full or partially
11 full 55-gallon drums marked with masking tape labels that read
12 "XYLENE TO BE STILLED". There were 45 full or partially full
13 55-gallon drums of dry paint sweepings, floor sweepings, foam
14 wastes and sawdust. Several of these containers had no lids,
15 no ringtop fasteners, or no bungs. There were no markings or
16 labels on the drums. Ninety-six 5-gallon containers of paint
17 or paint-related material remained on site. Several
18 containers were severely corroded and several were not closed.
19 There were also 10 5-gallon pails labeled "DAP caulking", and
20 16 55-gallon drums whose contents were unknown. One of the
21 drums had "SOLVENT" and three had "SOAP" written on them in
22 chalk. None of the containers were marked with accumulation
23 dates, none had labels identifying the major risks associated
24
25

1 with the drums' contents, and none were marked with the words
2 "dangerous waste" or "hazardous waste".

3 These materials were eventually designated as dangerous
4 waste by Comet Trailer and transported to TSD facilities.

5 XXIV

6 At the conclusion of the inspection, the inspector
7 conducted an exit interview with Steve Owens and informed him
8 of the problems seen and what Comet Trailer needed to do to
9 correct them. Mr. French mentioned his concern that a large
10 number of containers were remaining on site. Mr. Owens
11 indicated he was concerned with costs of analyzing the wastes
12 and that the cost would determine whether he was going to test
13 any more of the waste.

14 XXV

15 Ecology inspector French next inspected the Comet Trailer
16 facility on December 14, 1990. Chem-Safe was preparing 27
17 more drums of dangerous waste for transport. In the northeast
18 corner of the parking lot there remained several full drums of
19 xylene/paint waste, several drums of Part A foam and of Part B
20 foam, several drums of paint overspray waste, and numerous
21 5-gallon pails of paint stacked on pallets. Chem-Safe was not
22 preparing these containers for transport. The drums of foam
23 waste and paint overspray, and several of the pails of paint
24 had no lids. Some of the paint pails had lids that were not

1 firmly attached. None of the containers were marked with
2 accumulation dates, none had labels identifying the major
3 risks associated with the drums' contents, and none were
4 marked with the words "dangerous waste" or "hazardous waste".

5 Inspector French conducted an exit interview with the
6 company owner, Bud Owens, in which he again explained the
7 dangerous waste rule violations observed and the necessary
8 corrective actions. Mr. French indicated he was drafting an
9 enforcement order and possibly a penalty. Mr. Owens responded
10 by stating that Comet Trailer was a large business, produced a
11 lot of products, had a payroll of over a million dollars, and
12 if Ecology wanted to issue enforcement actions, to go ahead.

13 XXVI

14 Ecology's final inspection prior to its enforcement
15 action occurred on March 11, 1991. Steve Owens accompanied
16 Jerry French on the inspection. Forty to 50 full or partially
17 full 55-gallon drums and 5-gallon pails of paint were still
18 stored in the northeast corner of the parking lot. Many of
19 the drums were not labeled to identify their contents. Steve
20 Owens was unable to identify their contents. These materials
21 had not been designated. None of the containers were marked
22 with accumulation dates or with hazardous waste labels. Many
23 of the containers were open: they had no lids, no bungs, or
24 no ring top fasteners. One drum which had no lid appeared to

1 the inspector to contain floor sweepings. There was still no
2 secondary containment system in place to contain spills.

3 XXVII

4 During the inspection, the inspector asked Steve Owens to
5 identify the contents of one unlabeled, open drum. Mr. Owens
6 did not know the contents of the drum. He tipped it over and
7 spilled approximately one gallon of the liquid contents on the
8 ground. He ran his fingers through it, smelled it, and then
9 pointed to the stenciled words "TELLUS OIL" on the drum. It
10 is unknown whether this material was dangerous waste.

11 When asked by the Ecology inspector, Steve Owens did not
12 know what to do in the event of an accidental spill in this
13 drum storage area.

14 During the March inspection, Mr. French took samples from
15 sandblast piles located on the property. Prior to taking the
16 samples, Steve Owens gathered a pile of sandblast material in
17 his hands, dumped it on the ground at Mr. French's feet, and
18 stated "here's your sample". These sandblast piles were later
19 determined by Ecology to exceed cleanup standards under the
20 Model Toxics Control Act.

21 XXVIII

22 At the time of Ecology's inspections, Comet Trailer did
23 not have a written inspection schedule for inspecting the
24 facility and was not regularly inspecting the facility or
25

1 container storage areas. After Ecology issued the 1991 order
2 and penalty, Comet Trailer developed an inspection schedule
3 and began weekly inspections of its container storage areas.

4 XXIX

5 Prior to issuance of the 1991 order and penalty, Comet
6 Trailer did not have a written training plan, and did not have
7 a personnel training program to teach personnel dangerous
8 waste management requirements and how to respond to
9 emergencies.

10 From at least 1984 until Ecology's inspections in 1990,
11 Comet Trailer's president, Steve Owens, was the company's
12 hazardous waste manager, responsible for ensuring compliance
13 with the hazardous waste laws. Mr. Owens held that position
14 during the period of the previous dangerous waste violations
15 in 1985. Between 1985 and Ecology's inspections in 1990,
16 Comet Trailer did not have on staff anyone with expertise in
17 dangerous waste management nor did the company hire a
18 consultant. Mr. Owens has had no formal training and does not
19 have expertise in dangerous waste management. The only
20 actions taken by Comet Trailer to become familiar with the
21 requirements of hazardous waste laws between 1985 and
22 Ecology's inspections in 1990, was Mr. Owens' reading of the
23 state dangerous waste regulations in order to fill out the
24 annual reporting forms.

1 After the 1991 penalty and order were issued, Comet
2 Trailer eventually implemented a personnel training program in
3 compliance with Ecology's order.

4 XXX

5 Prior to issuance of the 1991 penalty and order, Comet
6 Trailer did not have any contingency plan for use in
7 emergencies that contained the information described in WAC
8 173-303-350(3). After Ecology issued the 1991 order and
9 penalty, Comet Trailer developed a contingency plan, in
10 compliance with the order.

11 XXXI

12 Prior to issuance of the 1991 penalty and order, Comet
13 Trailer did not have an emergency coordinator responsible for
14 coordinating all emergency response measures. After Ecology
15 issued the 1991 order and penalty, Comet Trailer designated
16 Glenn Collins, the company's secretary-treasurer, as the
17 emergency coordinator, in compliance with the order.

18 XXXII

19 Prior to issuance of the 1991 penalty and order, Comet
20 Trailer had not made any of the arrangements with local
21 authorities for emergency purposes listed in WAC 173-303-
22 340(4). After the order and penalty were issued, Comet
23 Trailer made such arrangements, in compliance with the order.

XXXIII

On April 17, 1991, Ecology issued a regulatory order (DE 90-C280) and penalty (DE 90-C281). The penalty listed the following violations:

- | | |
|--|---|
| WAC 173-303-060(2) | Failure to notify the Department of changes in type of dangerous waste activities. |
| WAC 173-303-070 | Failure to designate a solid waste as also being a dangerous waste. |
| WAC 173-303-200(1)(a) | Failure to comply with 90-day storage requirements. |
| WAC 173-303-200(1)(b) | Failure to properly use and manage containers of dangerous waste, including; |
| WAC 173-303-630(5) | Failure to properly manage containers of dangerous waste. |
| WAC 173-303-200(1)(c) | Failure to mark the date upon which each period of accumulation began on each container of dangerous waste. |
| WAC 173-303-200(1)(d) | Failure to identify the contents and major(s) associated with the dangerous wastes in each container. |
| WAC 173-303-200(e) | Failure to comply with facility requirements for generators, including; |
| WAC 173-303-320(2) | Failure to develop a written inspection plan. |
| WAC 173-303-330(1)
WAC 173-303-330(2) | Failure to provide a training program for facility personnel. |
| WAC 173-303-340 | Failure to implement preparedness and prevention measures. |

1 WAC 173-303-350(2) Failure to develop a written
2 contingency and emergency procedures
3 WAC 173-303-360(1) Failure to have emergency
4 coordinator(s) with responsibility
5 for coordinating all emergency
6 WAC 173-303-210(2) Failure to retain copy of 1987 Annual
7 Report for a period of three years
8 WAC 173-303-950(2) Operating a dangerous waste storage
9 facility without a permit.

10 Order DE 90-C280 identified the same violations and
11 required corrective actions for those violations.

12 On May 16, 1991, Comet Trailer filed an appeal of the
13 order and penalty. The parties entered into a stipulated
14 dismissal of the appeal of that order, compliance having been
15 achieved on all requirements except for several requirements
16 that Ecology had waived. The parties did not stipulate as to
17 the timeliness of Comet Trailer's compliance with the order.

18 XXXIV

19 Comet Trailer spent approximately \$35,000 to \$40,000
20 complying with Order DE 90-C280. Comet Trailer paid \$30,000
21 to Chem-Safe Services, Inc. for its services in designating
22 and arranging for proper transportation of the dangerous
23 wastes stored on site. Glenn Collins testified that the
24 remainder constituted the cost to the company of providing
25

1 in-house training. This included the cost of the employees'
2 time spent in training.

3 XXXV .

4 Any Conclusion of Law deemed to be a Finding of Fact is
5 hereby adopted as such.

6 From these Findings of Fact the Board makes these:

7 CONCLUSIONS OF LAW

8 I

9 The Board has jurisdiction over these parties and the
10 subject matter of this action. RCW 43.21B.300; chapter 70.105
11 RCW.

12 II

13 The xylene still bottoms, the xylene/paint mixture stored
14 prior to recycling, the paint floor sweepings, and the
15 Autofroth Component A mixed with sawdust were "dangerous
16 wastes" as defined in WAC 173-303-040(18).

17 III

18 Comet Trailer contends the paint, undercoating tar,
19 Part A foam, and Part B foam stored in the parking lot were
20 not wastes at the time of Ecology's initial inspections, but
21 were products which only became wastes when later discarded by
22 Comet Trailer.

23 A "solid waste" is any discarded material that is not
24 excluded by rule or by a variance granted by Ecology. WAC
25

26 FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW & ORDER -27-

1 173-303-016(3)(a). A discarded material includes any material
2 that is abandoned. WAC 173-303-016(3)(b)(i). Abandoned
3 materials include those that are disposed of, or are
4 "[a]ccumulated, stored, or treated (but not recycled) before
5 or in lieu of being abandoned by being disposed of, burned, or
6 incinerated". WAC 173-303-016(4)(a), (c).

7 A material may also be a solid waste based on its threat
8 to human health and the environment. WAC 173-303-016(b)(11)
9 states in pertinent part:

10 A material which is not defined as a solid waste in
11 this section, or is not a dangerous waste identified
12 or listed in this section, is still a solid waste
13 and a dangerous waste for purposes of these sections
14 if reason and authority exists under chapter 70.105
15 RCW and WAC 173-303-960. Within the constraints of
16 chapter 70.105 RCW, this shall include but not be
17 limited to any material that: Is accumulated, used,
18 reused, or handled in a manner that poses a threat
19 to public health or the environment[.] . . .

20 The paint, undercoating tar, Part A foam, and Part B foam
21 were all stored outside, uncovered. Some of the paint stored
22 on site had been moved there from Spokane in 1984 and was no
23 longer useable. Some of the pails were severely corroded, and
24 some were left open to evaporation and contamination by dust,
25 rain and other elements. Photographs taken by Ecology also
26 show open drums of Part A foam and Part B foam. The manner in
which this material was accumulated posed a threat to public
health and the environment. (See Finding of Fact XV.) These
materials were eventually disposed of by Comet Trailer.

1 We conclude that at the time of Ecology's inspections,
2 these materials were being accumulated or stored before or in
3 lieu of being abandoned by disposal, and were solid wastes
4 under WAC 173-303-016(3)(a), (b)(1), and WAC 173-303-
5 016(4)(c). We also conclude these materials constituted solid
6 waste under WAC 173-303-016(b)(ii).²

7 IV

8 The paint, undercoating tar, Part A foam, and Part B foam
9 were "dangerous wastes", as defined in WAC 173-303-040(18).

10 V

11 Small quantity generators are exempt from most of the
12 requirements of chapter 173-303 WAC. WAC 173-303-070(8)(b).
13 A generator is a small quantity generator if his waste is
14 designated as dangerous waste and

15 the quantity of waste that he generates,
16 accumulates, or stores (or the aggregated quantity
17 if he generates more than one kind of waste) does
18 not exceed the quantity exclusion limit for such
19 waste (or wastes). If a person generates,
20 accumulates, or stores any dangerous wastes that
21 exceed the QEL, then all dangerous waste generated,
22 accumulated, or stored by that person is subject to
23 the requirements of this chapter [173-303 WAC].

24 WAC 173-303-070(8)(a).

25 ²Even were we to have found these materials were not
26 solid wastes that would not change our decision. Ecology
would still have proven each of the violations alleged in the
penalty, and our decision regarding the reasonableness of the
penalty would remain the same.

1 The quantity exclusion limit for the dangerous wastes
2 generated and accumulated by Comet Trailer was 220 pounds per
3 month. At the time of Ecology's inspections, Comet Trailer
4 was generating and had accumulated dangerous wastes in excess
5 of the 220-pound QEL, was not a small quantity generator, and
6 was fully subject to the dangerous waste rules.

7 Notification of Dangerous Waste Activities

8 VI

9 WAC 173-303-060(2) requires every person with an
10 EPA/state identification number to "submit a revised
11 notification Form 2 to the department prior to any changes to
12 his company's . . . type of dangerous waste activity." Comet
13 Trailer began operating a storage facility when it accumulated
14 dangerous waste on site beyond the 90-day limit in the rules.
15 See WAC 173-303-200. See also Conclusion of Law IX, infra.
16 Comet Trailer violated WAC 173-303-060(2) by failing to submit
17 a revised notification Form 2 to Ecology when it began
18 operating as a storage facility.

19 VII

20 Comet Trailer violated WAC 173-303-060(2) by failing to
21 submit a revised notification Form 2 to Ecology when the
22 company began recycling dangerous wastes.

23 We are not persuaded by Comet Trailer's argument that it
24 met the requirements of the rule by virtue of the fact that
25

1 both Ecology and this Board knew Comet Trailer was conducting
2 recycling, as it was an issue in the 1985 hearing. All Form 2
3 notifications must be sent to Ecology program headquarters
4 where, for obvious reasons, the information is kept in a
5 central data bank. Just as the membership of this Board
6 changes, so does Ecology's staff. Oral or other alternative
7 means of notification is not sufficient. The plain language
8 of the rule requires submission of a revised form.

9 VIII

10 Designation

11 WAC 173-303-070 requires a generator of solid waste that
12 is not exempted or excluded from the dangerous waste rules to
13 determine whether or not that waste is dangerous waste. The
14 rule establishes required designation procedures. At the time
15 of Ecology's inspections in September 1990, Comet Trailer had
16 not designated any of the dangerous waste stored near the
17 recycling still or in the parking lot. Comet Trailer did not
18 designate numerous additional waste streams that it generated
19 until November 1991, more than a year after Ecology's first
20 inspections and seven months after Ecology issued its
21 regulatory order. Comet Trailer violated WAC 173-303-070.

IX

Storage/Accumulation

A generator may only accumulate dangerous waste on site without a permit for ninety days or less after the date of generation. WAC 173-303-200(1), (2)(a). A generator that accumulates dangerous waste for longer than 90 days becomes an operator of a storage facility, and is subject to the facility and permit requirements of the rules. WAC 173-303-200(1)(a).

Comet Trailer accumulated dangerous waste on site for two years without a permit, in violation of WAC 173-303-200(1)(a) and WAC 173-303-950(2).

Container Use and Management

X

WAC 173-303-200(1)(b) requires generators who accumulate dangerous waste on site without a permit to comply with certain requirements in WAC 173-303-630. WAC 173-303-630(5)(a) requires that containers holding dangerous waste always be closed, except when it is necessary to add or remove waste. Comet Trailer repeatedly violated WAC 173-303-200(1)(b) and -630(5)(a) by having containers of dangerous waste on site with no bungs, no lids, or no ring top fasteners fastening the lids to the drums.

1 XI

2 WAC 173-303-630(5)(b) states that containers of dangerous
3 waste must not be opened, handled or stored in a manner that
4 may rupture the containers or cause them to leak. Comet
5 Trailer violated this rule, and by reference WAC 173-303-
6 200(1)(b), by storing numerous containers of dangerous waste
7 in an unsafe manner: in its parking lot with no warning signs
8 or barriers to prevent collisions by vehicles. See Penberthy
9 Electromelt, International v. Department of Ecology, PCHB
10 No. 90-136 (1992).

11 XII

12 Comet Trailer violated WAC 173-303-630(6) and by
13 reference WAC 173-303-200(1)(b) by failing to weekly inspect
14 the areas where containers of dangerous waste were stored.

15 XIII

16 WAC 173-303-200(1)(b) requires new container accumulation
17 areas constructed or installed after September 30, 1986, to
18 comply with the secondary containment requirements in WAC 173-
19 303-630(7). Comet Trailer violated these rules by not having
20 a secondary containment system for the container storage area
21 in the parking lot.

22 XIV

23 Comet Trailer violated WAC 173-303-200(1)(c) by failing
24 to mark on any of the containers of dangerous waste near the
25

1 recycling still and in the parking lot the date on which the
2 period of accumulation for each container began.

3 XV

4 Comet Trailer violated WAC 173-303-200(1)(d) by not
5 marking on each container of dangerous waste near the
6 recycling still and in the parking lot the words "dangerous
7 waste" or "hazardous waste". Comet Trailer also violated this
8 rule and WAC 173-303-630(3) by not marking each dangerous
9 waste container with a label that identified the major risks
10 associated with the waste in the container for employees,
11 emergency response personnel and the public.

12 Facility

13 XVI

14 WAC 173-303-200(1)(e) requires generators who accumulate
15 dangerous waste on site without a permit to comply with the
16 requirements for facility operators in WAC 173-303-330 through
17 173-303-360. WAC 173-303-320(1) requires an owner or operator
18 to inspect the facility for malfunctions and deterioration,
19 operator errors, and discharges which may lead to the release
20 of dangerous waste to the environment or a threat to human
21 health. Areas subject to spills must be inspected daily when
22 in use. WAC 173-303-320(2)(c). WAC 173-303-320(2) requires a
23 written inspection schedule, and WAC 173-303-320(3) requires
24 the owner or operator to remedy any problems revealed by the
25

1 inspection. Comet Trailer violated these rules. It did not
2 have a written inspection schedule and was not regularly
3 inspecting the facility.

4 XVII

5 Comet Trailer violated WAC 173-303-330(1) by not having a
6 personnel training program to teach personnel how to perform
7 their duties in compliance with the dangerous waste rules and
8 how to respond to emergencies.

9 XVIII

10 Comet Trailer violated WAC 173-303-330(2) by not
11 developing a written training plan.

12 XIX

13 The dangerous waste storage area in the parking lot had
14 no communication or alarm system immediately accessible to
15 personnel, nor any available fire control, spill control or
16 decontamination equipment. Comet Trailer violated WAC 173-
17 303-340(1)(a), (1)(c), and (2)(a).

18 XX

19 Comet Trailer violated WAC 173-303-340(4) by not making
20 the arrangements with local authorities listed in -340(4)(a),
21 (b), (c) and (d).

22 XXI

23 Comet Trailer violated WAC 173-303-340(3) by not
24 maintaining sufficient aisle space near the recycling still to
25

1 allow the unobstructed movement of personnel, fire protection
2 equipment, spill control equipment, and decontamination
3 equipment in the event of an emergency.

4 XXII

5 Comet Trailer did not have a contingency plan at its
6 facility for use in emergencies or sudden or nonsudden
7 releases, in violation of WAC 173-303-350(2).

8 XXIII

9 Comet Trailer violated WAC 173-303-360(1) by not having
10 an emergency coordinator.

11 XXIV

12 Recordkeeping

13
14
15 XXV

16 We conclude Ecology has proven by a preponderance of the
17 evidence that each of the violations alleged in Notice of
18 Penalty Incurred and Due No. DE 90-C281 occurred.

19 Penalty Amount:

20
21 XXVI

22 RCW 70.105.080(2) authorizes penalties of up to \$10,000
23 per day for each violation of the dangerous waste rules. Each
24 violation is a separate and distinct offense, and each day's
25

1 continuance of an ongoing violation constitutes a separate
2 offense. RCW 70.105.080(2). The Board reviews de novo the
3 appropriateness of the penalty amount.

4 The factors we look at in reviewing the appropriateness
5 of a civil penalty include the nature of the violations,
6 including severity and extent; the prior behavior of the
7 violator; actions taken after the violations to solve the
8 problem, particularly those actions taken prior to issuance of
9 an order; and the maximum amount of penalty assessment
10 possible. Northwest Processing, Inc. v. Department of
11 Ecology, PCHB No. 89-141 & 143 (1991).

12 XXVII

13 Comet Trailer was in violation of numerous dangerous
14 waste regulations. Ecology's inspector testified that this
15 was the most egregious situation he had seen in terms of total
16 noncompliance with the regulations. These were continuing
17 violations. Some had been occurring for years prior to
18 Ecology's inspections, such as the designation and
19 accumulation violations. Some violations continued to occur
20 throughout the period of the five inspections, such as the
21 container management and designation violations.

22 The violations were also very serious. Comet Trailer had
23 been storing large quantities of dangerous and extremely
24 hazardous waste for a significant period of time. Some of the
25

1 containers were corroded, and some were open. Some of the
2 dangerous waste was stored outside in an unsafe place and
3 manner. The dangerous waste containers were not labeled, and
4 Comet Trailer personnel were not familiar with what was in the
5 containers. Nor was the personnel familiar with the
6 requirements of the dangerous waste regulations. Comet
7 Trailer provided no training and had no emergency response
8 system in place. The company's designated hazardous waste
9 manager did not know what to do in the event of an emergency.
10 His actions during the inspections reveal either a complete
11 lack of understanding or of respect for the seriousness of the
12 company's dangerous waste management practices and the need
13 for compliance with the regulations. These violations could
14 readily have resulted in a spill to the environment, with the
15 potential to reach the Yakima River, and could have endangered
16 the health of Comet Trailer personnel and the public.

17 In addition, Comet Trailer's continued failure to
18 designate its wastes has resulted in, among other things,
19 dangerous waste being disposed of at the local landfill. As
20 we noted in our prior Comet Trailer decision, the designation
21 requirements are at the very heart of the dangerous waste
22 regulatory scheme. Comet Trailer's failure to designate has
23 again resulted in dangerous waste ending up being disposed of
24 at the wrong place. See Comet Trailer v. Department of

1 Ecology, PCHB No. 85-151, 159, at 21 (1986). Comet Trailer's
2 violations were systemic and significant. The regulations
3 violated were neither arcane nor esoteric. See Northwest
4 Processing, supra.

5 Comet Trailer argues the penalty should be mitigated
6 because no environmental damage occurred. Even if we assume
7 that to be the case, it is the potential harm from violations
8 that the law seeks to eliminate. Ross Electric, Inc. v.
9 Department of Ecology, PCHB No. 86-225 (1989).

10 XXVIII

11 Looking at the prior behavior of the violator, Comet
12 Trailer received a compliance order and \$4,000 penalty in 1985
13 for violation of the dangerous waste regulations. That
14 penalty involved some of the same types of violations and
15 dangerous wastes at issue in this proceeding. Comet Trailer
16 had failed to designate xylene-soaked sawdust and lead-
17 contaminated dry paint waste, resulting in its disposal at the
18 local landfill. During the course of that proceeding, both
19 Ecology and this Board emphasized to Comet Trailer the
20 importance of the designation process. Comet Trailer v.
21 Department of Ecology, supra, at 7, 10, 21. The designation
22 procedures were discussed. We noted at the time of the
23 decision that Comet Trailer still had not designated its
24 paint, solvent and other products it used in order to
25

1 definitively resolve the question whether its present wastes
2 were regulated as dangerous wastes. Comet Trailer, at 14.
3 While we characterized Comet Trailer's approach to designation
4 as recalcitrant, we found that it was not a repeat offender,
5 but a slow learner. Comet Trailer, at 21-22.

6 Five years later, in 1990, Comet Trailer had still not
7 designated its wastes, and had continued to dispose of the
8 same types of wastes at the local landfill. Between 1985 and
9 1990, Comet Trailer had done virtually nothing to learn or
10 bring itself into compliance with the dangerous waste
11 regulations. We now find Comet Trailer to be a repeat
12 offender and its actions to be inexcusable.

13 XXVIX

14 The actions taken by Comet Trailer after the violations
15 and during the period of the inspections do not weigh heavily
16 in favor of mitigation. Ecology conducted five inspections
17 over a seven-month period. During each inspection, Ecology
18 provided oral notices of the violations. On each inspection
19 some of the same violations were noted, such as the failure to
20 designate wastes and the container management violations. We
21 do not believe that Ecology's failure to submit a letter
22 detailing the violations to be a cause of those continued
23 violations, as Comet Trailer alleges. The violations involved
24
25

1 were not technical. Comet Trailer had ample notice of the
2 violations.

3 Comet Trailer has eventually brought itself into
4 compliance with the regulations and Ecology's compliance
5 order. On balance, this does not outweigh the other factors
6 considered. Because no prior permit is required from Ecology
7 to operate solely as a generator, it is essential that
8 generators voluntarily learn and comply with the regulations.

9 XXX

10 Comet Trailer violated 23 separate provisions of the
11 dangerous waste regulations. Assuming only one day's
12 violation of each of those, Ecology could have issued a
13 penalty of \$230,000. Some of the violations had been
14 occurring for several years. If Ecology had counted each
15 day's continuance of each violation as a separate violation,
16 the maximum penalty would have been astronomical.

17 In light of all the facts and circumstances, we believe
18 the \$94,000 to be reasonable.

19 XXXI

20 Any Finding of Fact which is deemed a Conclusion of Law
21 is hereby adopted as such.

22 From these Conclusions of Law the Board enters the
23 following
24
25

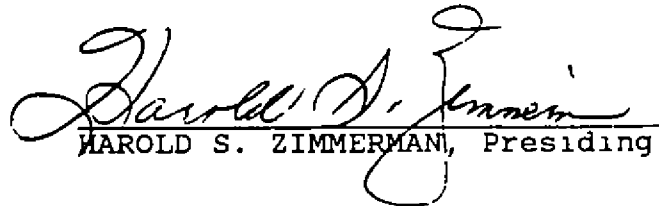
26 FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW & ORDER -41-

ORDER

The Notice of Penalty Incurred and Due No. 90-C281 in the amount of \$94,000 is AFFIRMED. \$44,000 of the penalty is suspended provided that Comet Trailer does not violate any state hazardous waste laws for three years from the date of issuance of the final order.

DONE this 31st day of December, 1992.

POLLUTION CONTROL HEARINGS BOARD


HAROLD S. ZIMMERMAN, Presiding


ANNETTE S. MCGEE, Member

720/comet ff: